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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DON HORSLEY, Sheriff, *Cross-Petitioner*,

v.

JOSE NAPOLEAN SANTAMARIA, *Cross-Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the collateral estoppel component of the Double Jeopardy Clause can bar or limit the retrial of a criminal defendant who is otherwise subject to the doctrine of continuing jeopardy?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

DON HORSLEY, Sheriff, *Cross-Petitioner*,

v.

JOSE NAPOLEAN SANTAMARIA, *Cross-Respondent*.

Cross-Petitioner Don Horsley, Sheriff, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998) (en banc). The amended opinion is reported in *Santamaria v. Horsley,* 138 F.3d 1280 (9th Cir. 1998) (en banc). App. A to Petition for Writ of Certiorari, filed by Jose Napolean Santamaria on May 29, 1998 (hereafter Santamaria's Petition).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, acting en banc, was entered on January 16, 1998. Rehearing was denied on March 5, 1998. App. A. The amended opinion of the Court of Appeals was filed on March 11, 1998. This Cross-Petition for Writ of Certiorari follows within 90 days. 28 U.S.C. §

2101(c); Supreme Court Rules 13.1, 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

On February 21, 1989, a jury found Jose Napolean Santamaria guilty of first degree murder and robbery, Cal. Penal Code §§ 187, 211, and found true a robbery-murder special-circumstance allegation, Cal. Penal Code § 190.2, subd. (a)(17)(i). The jury found not true a personal knife use sentence enhancement allegation, Cal. Penal Code § 12022, subd. (b).[1] The trial court sentenced Santamaria to life without possibility of parole for the murder. The California Court of Appeal reversed Santamaria's conviction after finding that an eleven-day continuance during jury deliberations constituted prejudicial error. *People v. Santamaria*, 229 Cal.App.3d 269, 280 Cal.Rptr. 43 (1991).

On February 6, 1992, Santamaria filed an in limine motion to prohibit retrial on the personal knife use enhancement allegation, and to preclude the presentation of evidence and argument by the prosecution in support

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1. The prosecution evidence showed that Santamaria and an accomplice robbed and murdered Santamaria's uncle. The victim was stabbed, strangled, and run over; the knife wounds caused his death. The accomplice testified for the prosecution that Santamaria stabbed the victim. Santamaria presented an alibi defense.

of the theory that he was the direct perpetrator of the murder, citing the doctrine of collateral estoppel. The trial court granted Santamaria's in limine motion, in part, by precluding the prosecution from retrying him on the personal knife use enhancement allegation, and from retrying him on the theory that he was the direct perpetrator of the murder. The court ordered that the jury be instructed at appropriate intervals throughout the trial that Santamaria did not personally use a knife during the murder. The court denied, without prejudice, Santamaria's motion to preclude the introduction of evidence, and stated that he could raise objections, particularly as to relevance, during the course of the trial.

The prosecutor informed the trial court that she was unable to proceed on the theory that remained following the partial grant of Santamaria's in limine motion. The trial court ordered the case dismissed due to lack of evidence to proceed.

The California Court of Appeal affirmed the trial court's order of dismissal. *People v. Santamaria*, 17 Cal.App.4th 1047 (1993). The California Supreme Court reversed, finding collateral estoppel inapplicable in these circumstances, and remanded the matter to the trial court with instructions to reinstate the charges. *People v. Santamaria*, 8 Cal.4th 903, 884 P.2d 81, 35 Cal.Rptr.2d 624 (1994).

Santamaria thereafter filed a petition for writ of habeas corpus in the District Court, raising the collateral estoppel claim. The State moved to dismiss the petition for failure to state a constitutional claim. The District Court denied the motion to dismiss, held that *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 296 (1992), controlled resolution of the issue, and granted the petition.

A three-judge panel of the Ninth Circuit Court of Appeals concluded that it was bound by its earlier precedent in *Pettaway v. Plummer*. *Santamaria v. Horsley*,

110 F.3d 1352 (9th Cir. 1997). The Court of Appeals later granted the State's petition for rehearing and suggestion for rehearing en banc. On January 16, 1998, the en banc panel of the Court of Appeals overruled *Pettaway v. Plummer* and reversed the District Court's issuance of the writ of habeas corpus. *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998) (en banc). On March 5, 1998, the Court of Appeals denied rehearing, and on March 11, 1998, filed its amended opinion, addressing in part the arguments raised in Santamaria's rehearing petition. *Santamaria v. Horsley,* 138 F.3d 1280 (9th Cir. 1998) (en banc).

REASONS FOR GRANTING THE CROSS-PETITION

A. Summary of Argument

The State has consistently argued throughout these proceedings that the collateral estoppel component of the Double Jeopardy Clause, first recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970), has no application to the retrial of a criminal defendant because the retrial is a continuation of jeopardy. The California Supreme Court concluded that this Court "might well not apply *Ashe, supra,* 397 U.S. 436, to a retrial of a count the jury had convicted the defendant of in the same action. But that court has not decided the issue in a case like this." *People v. Santamaria*, 8 Cal.4th at 915, 884 P.2d at 86, 35 Cal.Rptr.2d at 629. Finding that Santamaria's collateral estoppel claim could be rejected on the merits, the California Supreme Court did not reach the issue whether the doctrine of collateral estoppel was limited, like its parent doctrine of double jeopardy, only to successive prosecutions. *Id.* at 916, 884 P.2d at 86, 35 Cal.Rptr.2d at 629. The Court of Appeals, acting en banc, concluded it

had jurisdiction over the claim, but also rejected it on the merits. App. A to Santamaria's Petition at 2225, *but see id.* at 2238-40 (Kozinski, J., concurring) (finding no basis for invoking the power of federal habeas corpus because claim did not state constitutional violation).

This fundamental question, that is, the reach of the collateral estoppel doctrine in criminal cases, has given rise to conflicting opinions by the Courts of Appeals. Application of the doctrine has resulted in the avoidance of retrial, both on counts resulting in conviction and on counts on which a jury deadlocked, on grounds that collateral estoppel barred relitigation of issues found in the defendant's favor. Application of the doctrine has also resulted, as here, in federal court interference in the State's ability to retry a criminal defendant by interposing federal court review of a defendant's collateral estoppel claim before any retrial can commence. The resulting delay and prejudice to the State's ability to prosecute criminal cases, which the Court of Appeals' opinion does not prevent, may well recur in other cases in which a defendant seeks to avoid or delay his retrial.[2/]

This Court's double jeopardy jurisprudence points consistently to narrow application of the collateral estoppel doctrine articulated in *Ashe v. Swenson*. Yet the conflicting opinions of the Courts of Appeals show that the doctrine has been extended well beyond its initial narrow application, effectively expanding the reach of double jeopardy protection to bar retrial of criminal defendants whose convictions rest on constitutionally sufficient evidence. This Court's guidance is needed to clarify that the collateral estoppel component of the

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2. The Court has pending before it a Petition for Writ of Certiorari in *Griffin v. Penrod*, No. 97-8871, placed on the Court's docket on April 29, 1998, which challenges the same Court of Appeals' opinion at issue here and which arises in the same procedural posture as this case.

Double Jeopardy Clause is available only in the narrow circumstances present in *Ashe v. Swenson*, that is, when the State initiates a new and collateral prosecution after having failed to prove its case in an earlier one.[3]

B. Double Jeopardy Protection Does Not Extend to Retrial Absent a Finding of Constitutionally Insufficient Evidence

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *see Abney v. United States*, 431 U.S. 651, 660 (1977). However,

> the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction.

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3. We question the usefulness of *Ashe v. Swenson* in light of this Court's recent statement in *United States v. Watts*, ___ U.S. ___, 117 S.Ct. 633, 637 (1997), that "it is impossible to know exactly why a jury found a defendant not guilty on a certain charge." In order to apply collateral estoppel analysis, it is necessary to go behind a jury's verdict to determine what it concluded in its deliberations. We need not challenge the viability of *Ashe* here, however, because we submit it is inapplicable in any event.

Lockhart v. Nelson, 488 U.S. 33, 38 (1988); *see Montana v. Hall*, 481 U.S. 400, 402 (1987). This well-established rule protects both the societal interest in punishing a defendant whose guilt is clear, and the defendant's interest in ensuring that the reviewing court zealously protects his right to a fair trial. *Lockhart v. Nelson*, 488 U.S. at 38-39; *United States v. Tateo*, 377 U.S. 463, 466 (1964).

Requiring

> a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.

United States v. Scott, 437 U.S. 82, 91 (1978); *see Lockhart v. Nelson*, 488 U.S. at 42; *Tibbs v. Florida*, 457 U.S. 31, 40 (1982); *North Carolina v. Pearce*, 395 U.S. at 721. "The general rule is that the Clause does not bar reprosecution of a defendant whose conviction is overturned on appeal." *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 307-08 (1984). The exception occurs when there has been a finding of insufficient evidence to support the conviction. *Burks v. United States*, 437 U.S. 1, 18 (1978).

Implicit in the rule permitting retrial after reversal of a conviction is the concept of "continuing jeopardy," a principle that has application where criminal proceedings against an accused have not run their full course. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. at 308. Double jeopardy protection "by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). When jeopardy has not terminated, a defendant may not obtain a pretrial determination of evidentiary sufficiency on grounds that his retrial might violate double jeopardy. *Id.* at 322-26 & n.6.

The State intends to retry Santamaria for murder, a substantive offense of which he was convicted. It does not intend to retry him for personal use of a knife, a sentence enhancement allegation found to be not true.[4] Santamaria acknowledged that double jeopardy principles did not preclude his retrial for murder. *People v. Santamaria*, 8 Cal.4th at 911, 884 P.2d at 83-84, 35 Cal.Rptr.2d at 626-27. Because Santamaria does not contest "the very authority of the Government to hale him into court to face trial on the charge against him," *Abney v. United States*, 431 U.S. at 659, he does not state a double jeopardy claim.

C. Santamaria's Collateral Estoppel Claim Does Not State a Constitutional Claim Under the Double Jeopardy Clause

Despite his acknowledgement that double jeopardy principles do not preclude his retrial for murder, Santamaria has argued, relying on the doctrine of collateral estoppel, that the negative knife-use finding precludes his retrial for murder on the theory that he used a knife, because the ultimate issue of knife use has been found in his favor. We do not address here the basic flaws in Santamaria's argument concerning the import of the first jury's negative enhancement finding. *See* App. A to Santamaria's Petition; *People v. Santamaria*, 8 Cal.4th 903, 884 P.2d 81, 35 Cal.Rptr.2d 624; *see also United*

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4. Retrial of the personal knife use enhancement allegation is barred as a matter of state law. *People v. Santamaria*, 8 Cal.4th at 910, 884 P.2d at 83, 35 Cal.Rptr.2d at 626. Consequently, the question whether retrial of the enhancement allegation is barred as a matter of federal law has not been at issue in this case. The question whether double jeopardy protection extends to noncapital sentencing proceedings is currently before the Court in *Monge v. California*, No. 97-6146.

States v. Watts, ___ U.S. ___, 117 S.Ct. 633, 636-38 (1997) (an acquittal does not prove that the defendant is innocent of conduct; it merely proves the existence of a reasonable doubt as to his guilt; an acquittal does not preclude the prosecution from relitigating an issue under a lower burden of proof). The State has consistently argued that collateral estoppel has no application in these circumstances, and it is that issue we address here.

In *Ashe v. Swenson*, 397 U.S. 436, this Court recognized the doctrine of collateral estoppel as a component of the Double Jeopardy Clause. *Dowling v. United States*, 493 U.S. 342, 347 (1990). The doctrine provides that "'when an issue of ultimate fact has once been determined by a *valid* and *final judgment*, that issue cannot again be litigated between the same parties in any *future* lawsuit.'" *Id.* at 347 (emphasis added).

In *Ashe*, the prosecution failed at the first trial to convict the defendant of robbing one of six victims of a single incident of robbery. The prosecution successfully prosecuted the same defendant in a subsequent trial for robbing another of the six victims. 397 U.S. at 437-40. The Court concluded that the prosecution was collaterally estopped from prosecuting the defendant a second time, based on the first jury's verdict of acquittal. *Id.* at 446. In *Ashe*, the Court used collateral estoppel to serve the function of the Double Jeopardy Clause, which was otherwise inapplicable because the charge at issue was not the "same offense" as the one of which the defendant had been acquitted.

The *Ashe* collateral estoppel bar has no application to a retrial after reversal. There has been no "valid" and "final judgment" because the first judgment was reversed, and the second trial is not a "future lawsuit" but a continuation of the same prosecution. Manifestly, it is not a *collateral* proceeding. This Court has not applied the collateral estoppel bar beyond the narrow circumstances of the successive, collateral prosecution at

issue in *Ashe*. Nothing in that case or any subsequent case suggests that this Court contemplated barring or limiting retrials simply because a defendant had prevailed as to some, but not all, of the charges against him, so long as sufficient evidence supported the charges that resulted in conviction. On the contrary, the Court stated in *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984), that

> where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.

Rejecting the defendant's double jeopardy argument, the Court explained further,

> Respondent's argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now.

Id. at 501. Significantly, the *Ashe* Court did not suggest any erosion of the basic principle it had recently stated in *North Carolina v. Pearce*, 395 U.S. at 719-20:

> At least since 1896 . . . it has been settled that [the] constitutional guarantee [against double jeopardy] imposes no limitation whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.

(Emphasis in original; footnote omitted).

Like the well-established rule that double jeopardy does not bar retrial, *Justices of Boston Municipal Court v. Lydon*, 466 U.S. at 308-09, *Price v. Georgia*, 398 U.S. 323, 326, 329 (1970), collateral estoppel also does not bar or limit retrial following a defendant's successful appeal. This conclusion follows from the identical purpose behind double jeopardy-collateral estoppel--to protect a defendant against seriatim prosecutions initiated by the State, causing a defendant the embarrassment, anxiety, and expense of having continually to defend against the same charges. *See Ohio v. Johnson*, 467 U.S. at 498-99; *Ashe v. Swenson*, 397 U.S. at 445-47. This purpose has no relevance to retrial, which is a continuation of jeopardy. *See Lockhart v. Nelson*, 488 U.S. at 42; *Montana v. Hall*, 481 U.S. at 404; *United States v. Scott*, 437 U.S. at 91. In this respect, a retrial is critically different from a successive, collateral prosecution that results from the State's decision to initiate *new* litigation on a previously adjudicated offense.

The distinction is supported by *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849 (1993), in which this Court overruled *Grady v. Corbin*, 495 U.S. 508 (1990). In so doing, the Court noted that only a same-transaction test would eliminate the concern that the prosecution might attempt to bring separate prosecutions for offenses arising out of a single course of conduct. *Id.* at 2863-64 n.15. The Court expressly declined to adopt such a test, but noted that collateral estoppel could bar a subsequent *separate* prosecution if certain essential facts had been litigated and resolved in the defendant's favor in the first prosecution. *Id.* at 2860, 2863-64 n.15.

The Court's explanation in *Dixon* strongly suggests that the collateral estoppel component of double jeopardy comes into play *only* where the State attempts to bring a new prosecution after having lost an earlier prosecution based in part on the same essential facts. This is not such a case. The prosecution charged all

offenses in a single criminal proceeding, which has yet to reach final judgment. Santamaria's retrial for murder follows his successful appeal of his first conviction. It is not a separate prosecution, but a continuation of the original prosecution. Collateral estoppel has no application because the circumstance invoking double jeopardy-collateral estoppel protection--the State's attempt to bring a new charge after failing to prove a prior charge based upon the same essential facts--does not exist.[5]

Despite this Court's narrow application of collateral estoppel, however, the lower courts have continued, as evidenced by this case, to apply collateral estoppel analysis to circumstances where the criminal proceedings in a prosecution have not yet run their full course. *See, e.g, United States v. Romeo,* 114 F.3d 141 (9th Cir. 1997) (barring retrial on importation of marijuana charge on which jury deadlocked; jury had acquitted defendant on possession with intent to distribute); *United States v. McLaurin*, 57 F.3d 823 (9th Cir. 1995) (barring retrial on bank robbery charge on which jury had deadlocked; jury had returned guilty verdict on receiving stolen property charge); *United States v. Seley*, 957 F.2d 717 (9th Cir. 1992) (barring retrial on conspiracy count on which jury deadlocked; jury had acquitted defendant on possession and importation of marijuana charges); *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992) (jury had deadlocked on multiple counts and acquitted on others; court found collateral estoppel did not apply because, since original jeopardy never terminated, retrial was not collateral; therefore it applied "direct estoppel" to

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5. In *Schiro v. Farley*, ___ U.S. ___, 114 S.Ct. 783 (1994), this Court undertook a collateral estoppel analysis in the context of a single prosecution, but specifically noted that it was not addressing whether the doctrine was applicable in that context, in light of Schiro's failure to establish the factual predicate for application of the doctrine. *Id.* at 790. We ask the Court to address that question here.

preclude or limit retrial on multiple counts); *United States v. Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979) (acquittal on drug possession barred prosecution from proving issues decided in defendant's favor at retrial of conspiracy count on which jury deadlocked); *see also United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996); *United States v. Dray*, 901 F.2d 1132 (1st Cir. 1990).

Other courts have questioned whether the doctrine of collateral estoppel, like its parent doctrine of double jeopardy, is limited only to successive prosecutions. *United States v. Farmer*, 923 F.2d 1557, 1563 n.12 (11th Cir. 1991); *see United States v. Price*, 750 F.2d 363 (5th Cir. 1985) (finding collateral estoppel did not bar evidence on retrial that had been offered in first trial in support of counts of which defendant was acquitted). Some courts have undertaken a collateral estoppel analysis in successive, collateral proceedings and found the bar inapplicable under this Court's precedents. *See, e.g, United States v. Brackett*, 113 F.3d 1396 (5th Cir. 1997); *Wright v. Whitley*, 11 F.3d 542 (5th Cir. 1994); *United States v. Salamone*, 902 F.2d 237 (3d Cir. 1990). The analyses in these cases do not support application of collateral estoppel to cases in which jeopardy has not terminated.

Since this Court's articulation of the collateral estoppel doctrine in *Ashe*, numerous courts have undertaken a collateral estoppel analysis to determine whether retrial should be limited or barred based on prior acquittals. This Court's guidance is necessary to make explicit the reach of the collateral estoppel doctrine so that prosecutions are not needlessly delayed over issues that have no application to the circumstances of a criminal retrial.

D. The Inapplicability of Collateral Estoppel is Further Established Because the Doctrine Urged Merely Limits Evidence.

As noted, Santamaria does not dispute that he can be retried for murder. He contends instead that the prosecution is collaterally estopped from presenting evidence and argument in support of the theory that he stabbed the victim to death, because the first jury found the knife use enhancement had not been proved beyond a reasonable doubt.

Mere evidence limiting collateral estoppel does not state a constitutional claim and does not provide a basis for habeas corpus relief. In *Dowling v. United States*, this Court

> decline[d] to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances, as Dowling would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

493 U.S. at 348. The claim at issue in *Dowling* was that evidence should have been excluded, not that the defendant should not have been tried on the current offense. *Id.* at 351 n.3. The Court concluded that the Government was not constitutionally barred from using the evidence at issue, and for the same reasons, expressly rejected the lower court's holding that the "common-law doctrine of collateral estoppel" barred use of the evidence. *Id.* at 350. In *United States v. Felix*, 503 U.S. 378, 112 S.Ct. 1377 (1992), the Court observed,

> Underlying our approval of the Henry evidence in *Dowling* is an endorsement of the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.

Id. at 1383 (footnote omitted).

As noted in Judge Kozinski's concurrence in this case, App. A to Santamaria's Petition at 2238-40, other courts have distinguished collateral estoppel that is merely evidence limiting from collateral estoppel that would prohibit prosecution of an offense.

> [D]ouble jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible. Since successful interlocutory appeal from denial of such a collateral estoppel claim could only lessen and not wholly remove the possibility of conviction and lesser associated hazards of being tried again, [citation], no constitutional, as opposed to legal, right is at stake in such a claim.

United States v. Head, 697 F.2d 1200, 1205 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (footnote omitted); *accord United States v. Mock*, 604 F.2d 336, 340 (5th Cir. 1979). The Eighth Circuit similarly declined to extend *Ashe* to bar relitigation of evidentiary facts, noting that "[t]he law in this circuit is that collateral estoppel does not bar relitigation of facts that are evidentiary in the second prosecution." *Flittie v. Solem*, 775 F.2d 933, 942 (8th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1025 (1986).

Nor does the collateral estoppel bar turn on a distinction between collateral estoppel that is evidence limiting and collateral estoppel that affects a discrete basis for a jury verdict.

> [Defendant] attempts to distinguish, for this purpose, mere evidence-limiting collateral estoppel from collateral estoppel that would preclude the establishment of a "discrete basis" for a jury verdict. The latter, he claims, if not the former, rises to the level of "double jeopardy-collateral estoppel." This attempted distinction is one without a difference. The true distinction occurs, as indicated, at the point where the preclusion would run to reprosecution of a discrete criminal "offense." On this basis it might of course run to only one of multiple counts of an indictment, [citations], but it could not run to any mere evidence-limiting or "discrete basis" objection related to an otherwise provable criminal "offense."

United States v. Head, 697 F.2d at 1206 n.9.

Where the defendant seeks only the suppression of evidence that the prosecution plans to use in obtaining a conviction, as opposed to challenging the State's authority to hail him into court at all, he fails to state a constitutional claim warranting interlocutory review. *Abney v. United States*, 431 U.S. at 659. By the same analysis, a state petitioner raising the claim on habeas corpus fails to state a basis for relief. 28 U.S.C. § 2254(a).

Moreover, allowing interlocutory appeal or pretrial habeas corpus litigation on the collateral estoppel claim raised here cannot be reconciled with the inconsistent verdicts doctrine of *United States v. Powell*, 469 U.S. 57, 64-69 (1984). If a defendant cannot challenge a conviction with an inconsistent acquittal on appeal, it necessarily follows that he cannot use that acquittal to forestall the very retrial that he requested. The plain teaching of *Powell* is that it is unnecessary to harmonize verdicts, and that findings of guilt, even if inconsistent with findings of acquittal, may not be reversed simply because of the inconsistency. Whether presented as an insufficient evidence or a collateral estoppel claim,

a challenge to counts resulting in conviction cannot be launched from counts resulting in acquittal. *Id.* at 68. Whether findings are necessarily inconsistent or only possibly so, it nevertheless cannot be concluded that the jury acted rationally; hence, the principles of collateral estoppel are no longer useful. *Id.*

Application of collateral estoppel in the context of continuing jeopardy produces absurd results. It has allowed defendants to avoid answering criminal charges that have not been conclusively resolved and freed defendants who have been convicted of criminal charges, but whose convictions could not be secured a second time because relevant and probative evidence was barred. This windfall is in no way justified by any purpose inherent in the Double Jeopardy Clause. We ask this Court to clarify the reach of the collateral estoppel doctrine and restore realism, rationality, and common sense to its application.

CONCLUSION

For the reasons stated, the State respectfully asks that the cross-petition be granted.

Dated: June 8, 1998.

Respectfully submitted,

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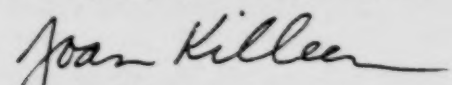

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APPENDIX A

FILED MARCH 5, 1998
CATHY A. CATTERSON, CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE NAPOLEAN SANTAMARIA,
Plaintiff-Appellee,

v.

DON HORSLEY, Sheriff,
Defendant-Appellant.

No. 95-16991
D.C. No. CV 95-0692 SBA

ORDER

BEFORE: BROWNING, WALLACE, PREGERSON, KOZINSKI, THOMPSON, TROTT, FERNANDEZ, RYMER, KLEINFELD, HAWKINS, and THOMAS, Circuit Judges.

A majority of the en banc court has voted to deny the petition for rehearing. Judge Pregerson has voted to grant the petition for rehearing.

The petition for rehearing is denied.